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Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

The NATIONALIST MOVEMENT,
A Mississippi non-profit corporation
incorporated in Georgia,
Petitioner

v.

The CITY OF CUMMING,
FORSYTH COUNTY, GEORGIA,
FORSYTH COUNTY BOARD OF EDUCATION,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1) Whether an impecunious non-profit corporation may proceed *in forma pauperis*, particularly, as here, where the *First Amendment* is impacted upon.

2) Whether due process under the *Fifth and Fourteenth Amendments*, the inherent or discretionary powers of the court or traditional notions of fair play and substantial justice do -- or should -- afford adequate notice, sufficient hearing and meaningful opportunity to defend to an attorney whose professional conduct is called into question.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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The Petitioner, The Nationalist Movement, by and through counsel, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this matter.

OPINION BELOW

The decisions of the United States Court of Appeals for the Eleventh Circuit from which certiorari is sought are contained in the case styled Nationalist Movement v. City of Cumming, Forsyth County, Georgia and Forsyth County Board of Education, to-wit: order denying leave to proceed in forma pauperis, issued September 8, 1989, see Appendix A, and opinion issued October 2, 1990, see Appendix B.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

1. 28 U.S.C. §1915(a) which reads:

> Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or

appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

2. 1 U.S.C. §1 which reads:

In determining the meaning of any Act of Congress, unless the context indicates otherwise

...

the words "person" and "whoever" include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals....

3. U.S. Constitution, Amend. I which reads:

Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the Government....

4. U.S. Constitution, Amend. V which reads:

No person shall be ... deprived of life, liberty, or property, without due process of law....

5. U.S. Constitution, Amend. XIV which reads:

> [N]o State shall ... deprive any person of life, liberty, or property, without due process of law....

6. Local Rule 110-6(c), Local Rules, . U.S. District Court, Northern District of Georgia (1985) which reads:

> [I]n those instances where the charge of misconduct was raised by a judge, the Chief Judge shall appoint another judge to hear the matter. At the hearing, the attorney whose conduct is the subject of the complaint shall be afforded an opportunity to appear in person and/or by counsel, to present oral and documentary evidence, to compel the attendance of witnesses or the production of documents, to cross-examine witnesses, and to present argument orally or in writing. If not called by the attorney whose conduct is being investigated, the judge at his discretion may call the complaining party to appear at the hearing. This rule shall not apply to sanctions, penalties, or other restrictions imposed by a judge which are applicable only to a particular case pending before him.

STATEMENT OF THE CASE

On July 12, 1989, Petitioner filed its Motion for Pauper Status in the Court of Appeals for the Eleventh Circuit. including affidavits setting out that

Petitioner was a non-profit charitable corporation limited by its charter to tax-exempt purposes under §501(c)(3), Internal Revenue Code (1954), that it organized public speeches, forums and debates under the First Amendment, that it was supported by donations, that no members or officials were paid, that no income inured to the benefit of any member, individual or official, that its income was about $300.00 per month expended mainly for postage, printing and communication in behalf of its First Amendment activities, that its physical assets were generally flags, supplies and printed materials of nominal value; that its cash-on-hand was less than $100.00 and that it was unable to pay costs due to its impecunious status.

A similar affidavit and motion was filed when the action was commenced in the district court, which motion was denied by

said court, and, again, in the district court in preparation for appeal, which motion was again denied by said court, on the grounds that Petitioner was not a "person" under 28 U.S.C. §1915(a).

The costs were paid by Petitioner's attorney individually "under protest."

On September 8, 1989, the Court of Appeals for the Eleventh Circuit denied Petitioner's motion to proceed in forma pauperis. The costs were paid by Petitioner's attorney individually "under protest," as in the district court.

Petitioner has filed a motion to proceed in forma pauperis separately, with this petition, with the costs being tendered "under protest" as previously.

On January 19, 1989, a hearing was held in the U.S. District Court for the Northern District of Georgia on Petitioner's claim for violation of First Amend-

ment rights. A temporary restraining order was sought against enforcement of various municipal ordinances and school rulings in connection with Petitioner's planned parade and rally on January 21, 1990. Relief was denied and the events were cancelled.

During the hearing, the trial judge expressed that he had "concern" about the manner in which counsel for Petitioner was conducting the case. His concern was directed particularly to the calling of a witness to introduce copies of correspondence between the parties as business records of which the witness -- having only been just appointed as Acting Secretary -- had no personal knowledge. However, the court made no adverse charges or adjudications in that regard. At one juncture, the trial judge admonished counsel that the court would consider

invoking Rule 11, F.R.C.P. sanctions if the attorney did not cease interposing objections relating to the attorney-client privilege, whereupon counsel discontinued making the objections. As to presenting the Acting Secretary, counsel advised the court that he was attempting to present his case in the most convenient and least expensive form, given that the Secretary was located in another state and that as a corporate official, himself, he was prepared to also testify, but was hesitant to do so while acting as counsel in the case. The documents offered (consisting of correspondence over the parade between the parties and a financial affidavit of the corporation) were, generally, admitted by stipulation (the affidavit was previously admitted as part of the motion for pauper status without objection) and no question was raised at any time as to the genuine-

ness of any of the documents.

On January 23, 1990, after the TRO hearing, the district court issued a written opinion in which counsel for Petitioner was charged with "fraud" in calling the Acting Secretary as a witness and in conducting the case. The court also stated that it was revoking counsel's pro hac vice admission.

Petitioner moved for reconsideration asking for a hearing and opportunity to be heard, which the court denied on April 25, 1989, although the court rescinded, at Petitioner's request, the order denying prospective pro hac vice admission.

The case was appealed to the Court of Appeals for the Eleventh Circuit. The Appeals' Court, on October 2, 1990, held that the district court's order reciting that Petitioner's counsel had been duly "warned" at the January 19th hearing,

particularly that Rule 11 sanctions would be "considered," afforded counsel an opportunity to respond and that the "cold record" supported a finding that "fraud" was committed by creation of a "false appearance" of the Acting Secretary's ability to testify.

On appeal, Petitioner averred that its counsel had not been duly "charged" or given an opportunity to meaningfully defend in violation of due process of law. It was also contended that local court rules requiring appointment of another judge to hear a matter involving professional conduct had been bypassed, further abridging procedural due process. Petitioner also cited Federal Rules of Evidence 803(6), 803(24) and 1006, Federal Rules of Civil Procedure, Rules 1 and 43(a) and statutes, 28 U.S.C. 1732, for the proposition that evidence may be

received in the most convenient and inexpensive manner and that personal knowledge of a witness is not required.

Reliance was placed upon ethical rule EC 7-4, Canon 7, Code of Professional Responsibility, Rule 3-107, Georgia Court Rules and Procedure (1989) (an ABA counterpart) which allows an attorney to act provided his position is supported by law or by a good faith argument.

Resort was also made to the inherent and discretionary powers of the court to exercise sound and just judicial disretion with great moderation in order to preserve the independence of the bar and the integrity of the court system.

The Appeals' Court held that a separate hearing was not called for, that the trial court is best suited for "the feel of the case" and that the decision was not clearly erroneous.

REASONS FOR GRANTING THE PETITION

PROPOSITION I

IN RULING THAT AN IMPECUNIOUS CORPORATION MAY NOT PROCEED IN FORMA PAUPERIS, THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IMPACTING UPON THE FIRST AMENDMENT IN A WAY WHICH CONFLICTS WITH AN APPLICABLE DECISION OF THE UNITED STATES SUPREME COURT OR, ALTERNATIVELY, WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THE UNITED STATES SUPREME COURT

There is already a Supreme Court case in which a corporate entity was granted leave to proceed in forma pauperis, Model Cities Policy Board of Ann Arbor v. Lynn, 411 U.S. 979, 84 S.Ct. 190 (1973).

Seemingly, discussion of whether a corporate litigant may be a "person" under 28 U.S.C. 1915(a) would end there. However, Model Cities granted leave without comment or written opinion.

Because the issue concerns a substantial federal issue, particularly, as

here, involving First Amendment rights of impecunious litigants, the Court is urged to grant the Writ and settle the matter.

28 U.S.C. 1915(a) is not mandatory. A court "may" allow an impecunious litigant's petition. But it would seem just to deny a petition, if at all, because of some defect in fact, such as, that the litigant was not genuinely impecunious, or perhaps due to some defect in procedure, such as, the affidavit was incomplete, untimely or defective.[1]

This court has denied in forma pauperis petitions on occasion, without

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[1] In Honolulu Lumber Co. v. American Factors, Ltd., 265 F.Supp. 578 (D.C.-Haw.1966), aff'd on other grounds, 403 F.2d 49 (9th Cir.1968) pauper status was denied because the small group of corporate organizers would have benefited personally and financially from the anti-trust litigation, unlike the case at bar.

comment, as well,[2] but lower courts have both granted and denied them.

1. Finding that a corporation may be a "person" for pauper status:

Harlem River Consumers Cooperative, Inc. v. Associated Growers of Harlem, Inc., 71 F.R.D. 93 (S.D.N.Y.1976); Ad Hoc Com. on Consumer Protection v. United States, 313 F. Supp. 119 (D.C.D.C1970), appeal dismissed for lack of jurisdiction, 403 U.S. 901, 91 S.Ct. 2204 (1971) (three judge court approving non-profit organization's pauper status); River Valley, Inc. v. Dubuque County, 63 F.R.D. 123, 124-25 (N.D.Iowa 1974); Allen Russell Pub., Inc. v. Levy, 108 F.R.D. 315 (N.D.Ill.1985).

2. Finding that a corporation is not a "person" for pauper status:

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[2] See, e.g. Assoc. for Preservation of Freedom of Choice, Inc. v. Nation Co., 375 U.S. 899, 84 S.Ct. 190 (1963) (three justices dissenting).

FDM Mfg. Co., Inc. v. Scottsdale Ins. Co., 855 F.2d 213 (5th Cir.1988); Move Organization v. United States Department of Justice, 555 F.Supp. 684 (E.D.Pa.1983).

The better view, in keeping with Model Cities, as well as long-standing policy and tradition, would seem to be:

> [N]either the words of the statute nor its legislative history can be read to attribute to Congress an intent not to include corporations of whatever nature within the meaning of the word "person" in this statute [28 U.S.C. §1915]. At the time of the amendment, 1 U.S.C. §1 was in effect which provides in part that "In determining the meaning of any Act or resolution of Congress ... the word 'person' may extend to and be applied to ... corporations...." Congress may be assumed to have been aware of this provision....
>
> The purpose of providing for leave to proceed in forma pauperis is to assure that litigants will not be deprived of access to the judicial system because of their financial circumstances.... Such a provision, embodied by statute in the law of the United States since 1892, reflects a tradition which has existed for centuries in Anglo-American law. See Comment, In Forma Pauperis ...

> [Comment, Proceeding in Forma Pauperis in Federal Court: Can Corporations Be Poor "Persons"? 62 Cal.L.Rev. 219, 235-43 (1974)]. This Court can find nothing in the language, the legislative history, or the policy underlying the in forma pauperis statute which supports denial of benefits of this provision to a litigant, solely because that litigant is a corporation.

Harlem River, 71 F.R.D. at 95-96.

A minor, 1959 change in 28 U.S.C. §1915(a) replaced the word "citizen" with "person," but, as the Harlem River court, also, observed, there was no indication that corporations were to be excluded (the change was directed to benefit resident aliens), Id.

It has been particularly true that corporations are considered "persons" when, as here, First Amendment rights are impacted, see Grosjean v. American Press Company, 297 U.S. 233, 56 S.Ct. 444 (1936); Southeastern Promotions, Inc. v. Conrad, 341 F.Supp. 465, aff'd 486 F.2d

894, cert. granted 415 U.S. 912, 94 S.Ct. 1406, rev'd 420 U.S. 553, 95 S.Ct. 1239, 1243 (1975). Note that Petitioner organizes public speeches and litigates, as here, free speech issues.[3]

It is long-standing tradition in this Court that corporations are also "citizens" for a wide-range of protections. See, e.g., Ramsey v. Tacoma Land Co., 196 U.S. 360, 25 S.Ct. 286 (1905) (corporation entitled to receive benefits of a statute providing for the purchase of certain tracts of land from the government which named beneficiaries "citizens of the United States"); Galveston H&S.A.R. Co. v. Gonzales, 151 U.S. 496, 14 S.Ct. 401 (1894) (corporation as "citizen" of state of incorporation held to be "established

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[3] See also, e.g., The Nationalist Movement v. City of Natchez, Mississippi, No. W88-0033(B), D.C.W.D.Miss., June 30, 1988 (unpublished).

doctrine" for jurisdictional purposes). Cf. Standard Oil Co. v. United States, 221 U.S. 50, 30 S.Ct. 502 (1910) (Sherman Anti-Trust Act construction of "person," corporation included if within the spirit and purpose of the statute).

It is urged, therefore, that the denial of pauper status is in opposition to an established precedent of the United States Supreme Court, as aforesaid, or, alternatively, that such an important federal question has been presented regarding the rights of the impecunious to have access to the courts, as yet unsettled by this Court, which should now be settled here.

PROPOSITION II

THE APPEALS' COURT'S SANCTIONING OF THE DISTRICT COURT'S ADVERSE FINDING OF PROFESSIONAL CONDUCT OF AN ATTORNEY WITHOUT ADEQUATE NOTICE, SUFFICIENT HEARING AND MEANINGFUL OPPORTUNITY TO DEFEND -- VIOLATING DUE PROCESS UNDER THE FIFTH AND FOURTEENTH AMENDMENTS, EGREGIOUSLY AB-

USING THE COURT'S INHERENT AND DISCRETIONARY POWERS AND CONTRAVENING TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE -- BEING SO FAR A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, CALLS FOR AN EXERCISE OF THE SUPREME COURT'S POWER OF SUPERVISION. OR, ALTERNATIVELY, THE APPEALS COURT HAS DECIDED AN IMPORTANT QUESTION OF DUE PROCESS WHICH HAS NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT. OR, ALTERNATIVELY, THE APPEALS COURT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

A threshold question is: Has this Court ruled previously that an attorney -- accused of "fraud" by a district court judge at trial -- is entitled to due process? Not squarely, so the case may be one of first impression. However, while upholding due process for instances of disbarment, this Court implies that due process also applies to proceedings where "conduct unbecoming a member of the bar" is called into question. Cf. Theard v. United States, 354 U.S. 280, 281-282, 77

S.Ct. 1274, 1276 (1957) (citing Rule 8, Rules of the Supreme Court of the United States,. that "ample opportunity must be afforded the accused" to defend himself). See also, Rule 8, id. Seemingly, a charge of "fraud" would be encompassed.[4]

The next question is: Is such a proceeding of so "serious" a nature, see Theard, id., as to invoke the supervisory powers of this Court? Again, though speaking of disbarment, this Court seems, by analogy, to include instances where "penalty" is imposed on the lawyer, In Re Ruffalo, 390 U.S. 544, 550, 88 S.Ct. 1222, 1226 (1968), reh. denied 391 U.S. 961, 88 S.Ct. 1833 (1968). In the case at hand, the district court directed that a copy of

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[4] To impact upon one's honor or reputation evokes the due process clause of the Fourteenth Amendment, Neal v. Secretary of the Navy, 472 F.Supp. 763 (D.C.Pa.1979). A charge of "fraud" would seemingly have such an impact.

its order be sent to the Georgia State Bar, where counsel's application for comity bar admission was then pending, seemingly to urge scme penalty upon the application.

The next question is: Is a fair hearing, adequate notice and meaningful opportunity to defend required by due process on the facts at hand? Here, "notice" consisted of: an expression of "concern" by the trial court about the attorney's conduct,[5] an utterance that Rule 11 sanctions might be considered[6] and an admonition that "if you've got any

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[5] Scarcely an occasion to begin, then and there, a "full-blown" defense of a would-be charge, inducing testimony, calling witnesses, cross-examining accusers and the like.

[6] The trial court referred to possible Rule 11 sanctions if counsel attempted to invoke further objections, which the court deemed to be improper. Counsel, thereupon, did not interpose such further objections.

other evidence to present, present it".[7]

The Appeals' Court held that a separate hearing is not required, finding that some notice and some hearing was afforded. But due process seemingly asks a different question: Has a fair hearing (separate or otherwise) upon fair notice been afforded?

Fairness requires that the precise nature of the charges must be made known and they must be known before the proceedings commence, id.

Due process is mandated because an attorney-conduct proceeding is quasi-criminal, see In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968), reh. denied 391 U.S.

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[7] The admonition to "present other evidence" in the case was not a meaningful opportunity to present evidence on the issue of professional charges. A reference to "getting on" with evidence meant moving along the trial at hand, rather than responding to charges.

961, 88 S.Ct. 1833 (1968) (disbarment). It also invokes the Fifth and Fourteenth Amendments, inherent and discretionary powers of the court and traditional notions of fair play and justice.

Although the court may proceed with somewhat fewer constraints on conduct before it, as opposed to conduct outside it, see Bradley v. Fisher, 80 U.S. 335, 343 (1871), even summary jurisdiction is not arbitrary power, id.).[8]

Issuing the Writ here will allow for such a full examination of the record.

Counsel was actually notified of charges after the trial court hearing, in a post-hearing order, in which the trial

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[8] A judge is not free to define due process in such a way as to violate the fundamental conceptions of justice which lie at the base of civil and political institutions and which define the nation's sense of fair play. United States v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044 (1977).

court also adjudicated the charges. And Petitioner's request for a hearing on such charges. and adjudication was, then, denied. Cf. Olsen v. McFaul, 843 F.2d 918, 930 (6th Cir.1988) (fair notice of charges required, citing Ruffalo); Cosby v. Ward, 843 F.2d 967, 982 (7th Cir.1988) (notice and opportunity for fair hearing required for unemployment compensation claimant).

Although the Appeals' Court gives "great regard" to the district court's findings on counsel's "motivations and state of mind," counsel did not testify, did not mount an express defense to the "concerns" and exhibited no action which would indicate an awareness of being "under the gun" for a charge of "fraud."[9]

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[9] The Appeals' Court noted the "state of mind" and "motivation" were part of a requisite fact-finding. At a full and fair hearing, counsel might detail his reasoning, call witnesses, cite authorities and present argument.

While the form of a proceeding touching on professional attorney conduct is to the sound discretion of the court, Bradley v. Fisher, 80 U.S. 335 (1871), procedural due process[10] is no less essential, cf. Willner v. Committee on Character & Fitness, 373 U.S. 96, 103, 83 S.Ct. 1175, 1180 (1963) (due process guaranteed by Fourteenth Amendment), Schware v. Board of Bar Examiners, 353 U.S. 232, 238-239, 77 S.Ct. 752, 756 (1957).

Nowhere does the record of the January 19th hearing show the district court saying "you are charged with ...." or comparable language on an allegation of

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[10] The Appeals' Court remanded the case on the separate issue of whether the City of Cumming had sufficient cause to ban parades and rallies on Saturday mornings, saying that the City had not had a "meaningful opportunity" to present its evidence. It would seem that justice would require a like standard for Petitioner's counsel.

"fraud". The Appeals' Court alludes to the Sixth Amendment, but finds that, notwithstanding, the trial court must be accorded "some discretion in monitoring its own processes."

Petitioner urges that some discretion must be sound discretion. Certainly, not summary action.

Rule 11, while allowing sanctions (including disciplinary action), does not appear to allow summary action in substitution for due process. In any event, counsel was not "charged" at the hearing with violating Rule 11.

According to Local Rule 110-6(c), Local Rules, U.S. District Court, Northern District of Georgia (1985), an accused attorney should be allowed to be heard and

to call the accusing judge.[11] But this safeguard of procedural due process was not adhered to either, despite Petitioner's request.

A final question would be: Is an important federal question raised by this case?

The critical balance between the bench and the bar is, indeed, of such importance, on the unique facts at hand.[12] Moreover, this case presents an opportunity to settle an emerging "boundary dispute" between the "independence of the

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[11] The provision does not apply when restrictions imposed by the judge are applicable only to a pending case before him. However, sending a copy of his later January 23rd written order to the state bar would, seemingly, evince the trial judge's intent to impact further, perhaps upon counsel's then-pending bar-admission application.

[12] The Appeals' Court's characterized this case as presenting "unique facts".

bar" and the "dignity of the court." Recalling the analysis of Chief Justice John Marshall:

> The [disciplinary] power, however, is not an arbitrary and despotic one, to be exercised at the pleasure of the court, or from passion, prejudice or personal hostility, but it is the duty of the court to exercise and regulate it by sound and judicial discretion whereby the rights and independence of the bar may be scrupulously guarded and maintained by the court, as the rights and dignity of the court itself.
>
> ...
>
> [D]iscretion ought to be exercised with great moderation and judgment....

Ex Parte Secomb, 60 U.S. 9 (1856).

A lawyer seeking Free Speech to uplift his client should be entitled to no less due process than an unemployed worker seeking compensation to feed his family, compare Cosby, supra.

Let there be no diminishing below of the protections afforded by Rule 8 in this

Court.

Neither let there be diminution of due process below from the guarantees assured here.

It appearing that the Appeals Court has sanctioned such a departure by the district court from the accepted and usual course of judicial proceedings, as well as the abridging of such constitutional rights, inherent and discretionary powers and notions of fair play and justice, this Court should exercise its powers of supervision accordingly and grant the Writ requested.

In the alternative, the Appeals' Court has decided an important due process question which has not been, but which should be, settled by this Court. Or, in the alternative, the Appeals Court has decided a federal question in a way which conflicts with applicable decisions of

this Court.

CONCLUSION

For the reasons stated, it is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

RICHARD BARRETT
Member of the Bar of the
Supreme Court of the
United States

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CERTIFICATE

THIS CERTIFIES that the undersigned has this day mailed, postage pre-paid, a true copy of the foregoing Petition for Writ of Certiorari to Gordon Smith, Esq., counsel for the City of Cumming, 2500 Trust Company Tower, Atlanta GA 30303; Sam Harben, Jr., Esq., counsel for the Forsyth County Board of Education, PO Box 2975, Gainesville GA 30503; and Robert Stubbs III, counsel for Forsyth County, Georgia, PO Box 1589, Canton GA 30114.

THIS the 1st Day of December, 1990.

RICHARD BARRETT

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8417

The NATIONALIST MOVEMENT,
A Mississippi non-profit corporation
incorporated in Georgia,
Plaintiff-Appellant

v.

The CITY OF CUMMING,
FORSYTH COUNTY, GEORGIA,
FORSYTH COUNTY BOARD OF EDUCATION,
Defendants-Appellees

[Filed September 8, 1989]

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY, Circuit Judge.

Order:

Appellant's motion for leave to appeal in forma pauperis is DENIED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 89-8417

The NATIONALIST MOVEMENT,
A Mississippi non-profit corporation
incorporated in Georgia,
Plaintiff-Appellant

v.

The CITY OF CUMMING,
FORSYTH COUNTY, GEORGIA,
FORSYTH COUNTY BOARD OF EDUCATION,
Defendants-Appellees

[Filed October 2, 1990]

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY and COX, Circuit Judges, and GODBOLD, Senior Circuit Judge.

GODBOLD, Senior Circuit Judge:

This case arose our of the efforts of a group called The Nationalist Movement to conduct a parade and rally in Cumming, Forsyth County, Georgia, in

January 1989. The Movement had held a parade and rally in Cumming in January 1988 to express its opposition to the federal holiday commemorating the birthday of Dr. Martin Luther King, Jr. It wished to hold a similar parade and rally on January 21, 1989, the date of the King Holiday, in order to again express its opposition.

To carry out its plan the Movement applied for permits from three distinct public bodies: the City of Cumming, Forsyth County, and the Forsyth County Board of Education. During months of negotiations the details of the proposed event changed from time to time, and several amendments, suggestions, and alternatives were considered, but the major thrust of the plan ran this way: the Movement proposed that participants assemble on the grounds of the Forsyth

County High School in Cumming, march along a public street to the county courthouse square, and there conduct a rally and speeches for one and a half to two hours. When the rally ended participants were to march back along the same route to the high school and disperse.

Initially the events were planned for Saturday afternoon, January 21. The Movement applied to the Superintendent of Education for permission to assemble on the high school grounds. It applied to the City Administrator for a permit to parade along a designated street, going to and coming from the courthouse square, and it applied to the County Administrator for a permit to conduct a rally on the courthouse steps.

The Movement was not successful in securing permits on terms and conditions agreeable to it. After an initial denial

(until the Movement could show that it had an assembly point for the rally off the right of way for the street), the City Commission granted a parade permit for a parade to commence at 1:00 p.m. on Saturday, January 21, from the high school, to proceed to the courthouse, and to return. The City refused to close all traffic on the street during the parade and limited the Movement to the use of only one lane of the two-lane street.

After receiving this authorization, the Movement decided to change the time of its event in Cumming. It scheduled a rally in Atlanta for the afternoon of January 21 and received authorization from the City of Atlanta to conduct it. The Movement then sought to shift events in Cumming to Saturday morning, beginning at 9:00 a.m., planning to inform participants there of the Atlanta events and to urge

them to attend. The City declined to change the authorized parade time because of the following provision of the City Parade and Assembly Ordinance.

> [No] private organization or group of private persons may use the roads immediately adjacent to and those roads which lead directly to the Forsyth County Courthouse grounds for private purposes of holding a parade, assembly, demonstration, or other similar activity on any non-holiday weekday prior to 8:00 a.m. or after 5:00 p.m. or on any Saturday, Sunday, or public holiday prior to 1:00 p.m. or after 5:00 p.m.

City Amended Parade and Assembly Ordinance, §6(g) (emphasis added).[1]

On December 30, 1988, the County approved the Movement's application for a

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[1] This provision was enacted as part of an Amended Ordinance adopted October 1, 1987. Interpretation of this language at the hearing in a dialogue between the court and counsel for the City, Rec. III, at pp. 208-209, proved somewhat murky. But the "Saturday morning ban," which limits a parade on the streets on a Saturday to the hours between 1:00 p.m. and 5:00 p.m. is clear.

rally on the courthouse steps and grounds lasting from about 8:00 a.m. to 11:00 a.m. on January 21, subject to the payment of a $100 application fee. A few days later, the Board of Education gave its consent for the participants to assemble on January 21 at the high school, conditioned first upon the Movement's obtaining permission from the City and County to conduct its parade and assembly and, second, on the requirement that the premises not be damaged or littered.

While continuing to negotiate with the City about the timing of the event, the Movement discussed with a lawyer for the Board of Education an alternative authorization to use the high school parking lot for its rally and speeches in the event the parade and the rally at the courthouse were "interfered with." It is uncertain whether the request was ever

presented to the Board or was merely discusses with its counsel, but, in any event, approval to conduct a rally and speeches on school grounds was not given.

On January 19 the Movement filed suit in the district court for the Northern District of Georgia seeking a temporary restraining order, temporary and permanent injunction, compensatory and punitive damages, and attorney fees. On this same day the district court conducted a hearing on the request for a TRO. On January 23 it entered a written order denying the request. Two days later, the court entered a final judgment dismissing the case on the merits.

I. The City

The Movement contends that the section of the City's parade ordinance that bans parades and assemblies on Saturday mornings on streets adjacent to, or

leading to, the county courthouse, violates the First Amendment on its face and as applied. Indisputably the proposed parade involves First Amendment activity. Also beyond dispute is the fact that this ordinance regulates such activity within a traditional public forum, indeed, "the archetype of a traditional public forum," public streets. Frisby v. Schultz, 487 U.S. 474, 480-81, 108 S.Ct. 2495, 2499-2500, 101 L.Ed.2d 420 (1988). See Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 954, 74 L.Ed.2d 794 (1983); Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 963, 83 L.Ed. 1423 (1939) (Roberts, J., joined by Hughes, C.J., and Black, J.). Our method of determining the constitutionality of the ordinance depends initially upon whether it regulates expressive activity on the basis of content. If the restric-

tion is based on the content of the expression, then the ordinance must be "necessary to serve a compelling state interest and ... narrowly drawn to achieve that end." Perry, 460 U.S. at 45, 103 S.Ct. at 954. If the ordinance is content neutral, then it must be "narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." Id.

The district court determined that §6(g) of the parade ordinance was content-neutral. Although this section was enacted in the wake of previous demonstrations by the plaintiff and its affiliated organizations in Cumming, the ordinance on its face does not discriminate among paraders on the content of their proposed expressive activities. The Movement nonetheless contends that the City's refusal to allow it to hold its activities in the morning

was motivated by disagreement with the Movement's message. This contention is refuted by the simple fact that the City granted the Movement's earlier request to conduct a parade in the afternoon. The district court's determination is correct.

Thus the City's burden is to establish that its ordinance furthers significant municipal interests, that its restrictions are narrowly tailored to achieve those interests, and that those wishing to engage in expressive activity in Cumming have ample alternative means of doing so. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 n. 5, 104 S.Ct. 3065, 3069 n. 5, 82 L.Ed.2d 221 (1984) (once plaintiff demonstrates that First Amendment applies, the government bears burden of justifying impingements on protected activity); id., at 309, 104 S.Ct. at 3077 (Marshall, J.,

joined by Brennan, J., dissenting) ("The First Amendment requires the government to justify every instance of abridgement.") (emphasis in the original). Unfortunately, because of the manner in which the hearing on the TRO request developed, the City did not have an opportunity to offer evidence to sustain this burden. After the plaintiff rested, a dialogue followed between court and counsel for all parties. Before permitting the City to present evidence, the court stated from the bench that the City "for some reason" had made a determination that Saturday morning parades were undesirable, that this ban was applied evenhandedly, and that the Movement had alternative means of conducting a parade since Saturday afternoon was available. The court then dismissed the suit against the City. Rec. III, p. 127. The County and the Board of Education then put

on evidence, but the City did not in light of the court's oral ruling.[2]

We cannot affirm the judgment in favor of the City on the basis of the record before us. Although the City identified some of the governmental interests to be served by the ordinance in the preamble, which we set out in the margin, the record contains no evidence showing how those interests were advanced by a Saturday morning ban on parades and ral-

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[2] In its subsequent written order the district court held that the ordinance was not an absolute prohibition on speech but merely regulated the time and manner of the activity, that it was content-neutral, and that there was no evidence it was not applied evenhandedly to all groups. Accordingly, the court found that the ordinance was reasonable, served significant government interests, and did not unduly burden the First Amendment rights of the Movement or its members.

lies.[3] The City must demonstrate the

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[3] The recitals of findings and purposes contained in an ordinance's preamble can serve to identify governmental interests for the purpose of this analysis. See Frisby v. Schultz, 487 U.S. 474, 477, 108 S.Ct. 2495, 2498, 2502, 101 L.Ed.2d 420 (1988). Indeed, such recitals may well be entitled to greater weight in identification of governmental interests than post hoc articulations by counsel in judicial proceedings. The City of Cumming set out the following findings in the preamble of its Parade Ordinance.

> WHEREAS the General Assembly of the State of Georgia has delegated the police powers of the State of Georgia to the City of Cumming, Georgia, with respect to persons and property situated within the municipal limits of the City of Cumming, Georgia, and expressly authorized and empowered said Mayor and Council of the City of Cumming, Georgia, to make such rules and regulations with respect to persons or property and all other things affecting the good government of the City as it shall deem requisite and proper for the security, welfare, health, safety, and convenience of the City and for the preservation of the peace and good order of same; and
>
> WHEREAS private organizations and groups of private persons have from time to time sought to use public property and public roads within the

jurisdiction of the City of Cumming, Georgia, for private purposes; and

WHEREAS such uses have included parades, assemblies, demonstrations, road closings, and other related activities; and

WHEREAS it is in the public interest that such uses not interfere unduly with the rights of citizens not participating therein nor endanger the public safety nor obstruct the orderly flow of traffic; and

WHEREAS it is right and proper for the security, welfare, health, and convenience of the citizens of the City of Cumming, Georgia, and for the preservation of the peace and good order of said City that rules and regulations relating to parades, assemblies, demonstrations, road closings, and other related activities within the city limits of the City of Cumming, Georgia, be established and that violations of said rules and regulations be punishable in the police court of Cumming as provided by laws; and

WHEREAS the City of Cumming's Administrator shall be empowered to designate reasonable sites and set reasonable time schedules for the beginning and end of parades, assemblies, demonstrations, road closings, and other related activities where more than one is applied for

or where the proposed activity interferes with the public safety or obstructs the orderly flow of traffic; and

WHEREAS the City Administrator should be empowered to cancel the permit for any parade, assembly, demonstration, road closing, or other related activity where the participants fail to appear and begin within any reasonable time of the scheduled time based upon other activities permitted or based on the unreasonable interference with the public welfare, peace, safety, health, good order, and convenience to the general public; and

WHEREAS the City Administrator should be empowered to coordinate all of his duties and decisions under this Ordinance with the official designated by the County of Forsyth charged with the same duties and decisions as to parades, assemblies, demonstrations, road closings, and other related activities; and

WHEREAS the Board of Commissioners of Forsyth County, Georgia, has amended its Ordinance to restrict interference with the administration of justice on the Forsyth County Courthouse grounds and to minimize the likelihood of interference with the rights of non-participating citizens residing in close proximity

logical and practical relationship between the restriction and these interests, so that the court may determine whether the restriction is substantially broader than is necessary to achieve these ends. See Ward v. Rock Against Racism, ____ U.S. ____, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661 (1989); Community for Creative Non-Violence v. Turner, 893 F.2d 1387, 1391-91 (D.C.Cir.1990). Requiring any lesser showing would render the "narrow tailoring"

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to the Forsyth County Courthouse; and

WHEREAS the Mayor and Council of the City of Cumming, Georgia, wish to maintain the free flow of traffic on the roadways around and leading to the Forsyth County Courthouse grounds; and

WHEREAS the Board of Commissioners of Forsyth County, Georgia, have recently amended the County's Ordinance regarding this subject matter, making it advisable and necessary for the Mayor and Council to amend the City's Ordinance to maintain

factor of the analysis nugatory.

Although the City has not carried its burden of justifying the challenged provision of its ordinance, it has not had a meaningful opportunity to do so. Therefore, we vacate the judgment as to the City and remand for further proceedings on the Movement's complaint against it. The Movement also challenged that aspect of the City's permit limiting the parade to one lane of the two-lane street that leads from the high school to the courthouse. This claim must also be remanded to the district court for further proceedings for the same reasons.[4]

> consistency within these respective jurisdictions; ...

[4] The City informed the Movement by letter that it had granted the permit. After the statement that the parade is to commence at the high school, the letter contains this parenthetical sentence: "(You must obtain permission from school

II. Forsyth County

The Movement attacked as facially unconstitutional the County ordinance providing for a permit fee of up to $1,000 per day for each day that a parade or rally takes place.[5]

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authorities to use their property for parking and assembling.)" We do not construe this sentence as a provision conditioning the City's permit on Board of Education approval. Rather it appears to be merely a cautionary notice that the City permit does not cover parking or assembling on school property and that permission for those purposes must be obtained from school authorities. Even if this sentence is a formal condition on the City's permit, it amounts to no more than a reasonable decision to hold the Movement to the terms of its application. See discussion in section III. of text, infra.

[5] Sections 6 and 7 of the Amended County Ordinance, No. 34, provide:

> (6) Every private organization or group of private persons required to procure a permit under the provisions of this Ordinance shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 fir each day such parade, procession, or open air public

> The crucial concern here is the extent of the right of the public to use the city streets and parks, which the Supreme Court has regarded as quintessential public forums, to exercise First Amendment activity, without the imposition of pecuniary burdens which allegedly go beyond a municipality's concern of legitimate interests.

Central Florida Nuclear Freeze Campaign v. Walsh, 774 F.2d 1515, 1521 (11th Cir.-1985), cert. denied, 475 U.S. 1120, 106 S.Ct. 1637, 90 L.Ed.2d 183 (1986). In

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> meeting shall take place. The Administrator shall adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed. In no event shall the Administrator calculate the amount of the permit fee by considering said fee as a revenue tax.
>
> (7) If the private organization be other than individuals, a permit will not issue without paying the necessary fee; individuals may be excused from such a deposit on account of indigence upon the execution under oath, by each individual in the group applying for the permit, of a pauper's affidavit. Prior

Central Florida we considered the constitutionality of an Orlando, Florida ordinance that authorized the Chief of Police to charge persons exercising First Amendment rights the full cost of additional police protection, as a condition to the granting of a permit. We held:

> Although license fees are proper for the costs of administering an event, under the Supreme Court's decision in Cox v. New Hampshire [312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941)], we read Cox as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities. An ordinance which charges more than a nominal fee for using public forums for public issue speech, violates the First Amendment. We, therefore, hold that the Orlando City Ordinance 18A.12 which requires persons wishing to use city streets and parks to demonstrate, to pre-pay an amount of costs for additional police protection determined by the discretion of the chief of police is unconstitutional.

Id. at 1523.[6] In the present case the district court recognized that the Forsyth County Administrator, like the Orlando Chief of Police, had greater discretion in determining an appropriate fee and held that, under the evidence, the Administrator exercised that discretion by charging

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> to the receipt of such an affidavit the Administrator shall advise the applicant orally or in writing of the penalties for the execution of a false document.

[6] Our interpretation of Cox was aided substantially by the later case of Murdock v. Pennsylvania, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), as well as by more recent Supreme Court cases involving traditional public forums. Central Florida, 774 F.2d at 1522. Concurring on other grounds, Judge Henderson disagreed with the majority's reading of Cox. Id. at 1527-28 (Henderson, J., concurring); see also Kaplan v. County of Los Angeles, 894 F.2d 1076, 1081 (9th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 2590, 110 L.Ed.2d 271 (1990). We have reviewed Supreme Court cases involving public forums decided since Central Florida, and find no basis on which to reevaluate its ruling. See, e.g., Smith v. Duff and Phelps, Inc., 891 F.2d 1567, 1570 (11th Cir.1990) (previous decision of

for the costs of investigating and processing the application. There was no element of charge for the potential cost of additional police protection or for maintaining public order, and the determination of the fee was based solely upon content-neutral criteria.[7] These distinctions addressed the methodology described in Central Florida for determining a fee. But the First Amendment imposes limitations on the size of a fee apart from the permissible components of it. To repeat, "we read Cox as authorizing only nominal charges for the use of city streets and parks to further First Amendment activities. An ordinance which charges more than a nominal fee for using public forums

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this circuit is binding on subsequent panel, unless overruled by the circuit court sitting en banc, or called into question by change in Supreme Court precedent).

[7] The court expressed doubt about

for public issue speech, violates the First Amendment." 774 F.2d at 1523.[8] It is not necessary that we stake out the outer limits of a "nominal" charge.[9] It is enough to hold, as we do, that the Forsyth County provision for a permit fee of up to $1,000 for each day that a parade

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the constitutionality of the portion of the ordinance that permits fees to be based upon the costs incident to maintaining public order but considered that issue not squarely before it.

[8] Given our conclusion that the ordinance is facially unconstitutional, we need not address the Movement's arguments concerning the section of the ordinance that exempts certain persons from payment of fees on the basis of their ability to pay. See Central Florida, 774 F.2d at 1523-24. At the January 19 hearing counsel for the County attempted to explain the operation of the exemption provision. Despite the attempt, this provision appears to be virtually incomprehensible, at least in its application to corporate applicants like the Movement.

[9] Central Florida concerned costs that would arise from furnishing police protection for an event to occur on a nonworkday by using off-duty officers who would be paid time and a half. The Movement contends that assessing a fee for

or rally takes place exceeds the constitutional requirement that such a charge be at most nominal.[10]

III. The Board of Education

The Board of Education granted the Movement permission to assemble on the high school grounds without limitation as to morning or afternoon and without imposition of a fee. Nevertheless the Movement contends that its First Amendment rights were violated because the Board conditioned the permit on approval by the City and County of the Movement's parade and rally applications. In its formal application the Movement requested permission only to use the school parking lot as

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administering a speech event cannot be based, as it was here, upon usual duties performed by regular employees during regular duty hours. We need not decide this issue.

[10] The Movement also challenged the County's imposition of a $100 permit fee

a base from which to assemble, to immediately depart while conducting its other activities, and to return three hours later to disassemble. The participants in the event would thus be on school grounds only a short time prior to the parade and another short time after it. It was also evident in the permit application that the parade and rally would take place well off school grounds. These circumstances were clearly important factors for the Board to consider, since another event, a junior high basketball tournament, was scheduled to take place on school facilities during the morning and afternoon of the same day as the rally. Thus, the Board's stated "conditions" are no more than a restatement of the premises of the plaintiff's application to it. In granting the permit, the Board gave the Movement precisely the authority requested. The Movement's

argument that in doing so the Board somehow violated the First Amendment is both ironic and meritless.

Shortly before the date of the King holiday, after arrangements with the City had failed, the Movement requested approval in discussions with the Board's legal counsel to conduct its rally and speeches in the school parking lot. The Board denied this request on the ground that such a rally would disrupt the previously scheduled basketball tournament.[11] The Movement conceded at the TRO hearing that the school parking lot was not a traditional public forum. The district court noted that the record contained no evidence that the Board of Education had

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on it as an unconstitutional application. Because we hold that the ordinance is facially unconstitutional we do not need to inquire whether the particular imposition of $100 is unconstitutional.

[11] The record is unclear on the

expressly designated this parking lot as an area for speech activity. See Perry, 460 U.S. at 45, 103 S.Ct. at 954; see also United States v. Kokinda, ___ U.S. ___, 110 S.Ct. 3115, 3121, 111 L.Ed.2d 571 (1990) (plurality opinion) (government does not dedicate an area as a public forum by permitting limited discourse there but only by intentionally opening it for general public discourse) (citing Cornelius v. NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 802, 105 S.Ct. 3439, 3449, 87 L.Ed.2d 567 (1985)). Thus, the Board "may reserve the [parking lot] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not merely an effort to suppress expression merely because public officials oppose the speaker's view." Perry, 460 U.S. at 46, 103 S.Ct. at 955. The record demonstrates

amply that the Board denied the Movement's request on the basis of its judgment that the plaintiff's assembly was incompatible with the other events taking place at the school that day, not out of disagreement with the Movement's viewpoint. The Board's action was reasonable and did not violate the First Amendment rights of the plaintiff.

IV. Evidentiary rulings

In an effort to introduce purported business records of the Movement, its attorney Richard Barrett (who is also its chief executive officer), "appointed" an available member of the organization, Dennis Wheeler, as "acting secretary" on the morning of January 19 and called him at the hearing later that day as a witness to authenticate the records. The witness had no knowledge of the records, could not identify them, and had never seen them

until presented them by the attorney that morning. The district court granted defendants' motions to strike the testimony of this witness; therefore, Wheeler was unable to authenticate the records. See Fed.R.Evid. 602.[12]

The court did not err in taking judicial notice that it had "observed that plaintiff's rallies and marches are often loud and attract boisterous and sometimes violent counter-demonstrators," and that "the potential for noise and violence is great." There had been two previous marches in recent years in Cumming by the

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issue of whether the Board of Education actually considered the Movement's request to conduct a rally in the parking lot. We assume for purposes of analysis of this issue that the Board denied the request.

[12] The plaintiff argues at length on appeal that the district court erred in refusing to introduce into evidence correspondence and other documents proffered while the witness was on the stand. The argument has not merit. The district

Movement, or by what it called its local affiliate," which it described as operating within the Movement's corporate umbrella or corporate protection." The marches and counter-marches in the county had been the subject of national publicity and attention and had implicated sharp racial tensions. At least two federal cases involving these prior events had occurred in the same judicial district as the present case, each with considerable fanfare. The district judge's observations were apparently based on local and national media accounts, as well as on public records. Moreover, these facts were generally known within the Cumming and Atlanta areas. Thus, they were proper subjects of judicial notice. See Fed.R.Evid. 201(b); Gilmore v. City of Montgomery, 417 U.S. 556, 567, 94 S.Ct. 2416, 2423, 41 L.Ed.2d 304 (1974); Norman

v. Housing Authority of City of Montgomery, 836 F.2d 1292, 1304 (11th Cir.1988); Kinnett Dairies, Inc. v. Farrow, 580 F.2d 1260, 1278 n. 33 (5th Cir.1978); see also Holland v. Wilson, 737 F.Supp. 82, 84 (M.D.Ala.1989) (noting violence attending those prior rallies). In any event, the Movement did not request a hearing before the district court on this issue pursuant to Fed.R.Evid. 201(e). See Norman, 836 F.2d at 1304 (failure to move for hearing renders issue non-appealable).

V. Rulings Relating to Pro Hac Vice Issue

At the hearing held on January 19, the district court allowed Barrett to appear in the case pro hac vice for the Movement. As the hearing proceeded, however, the district judge made known his ethical concerns about several actions by Barrett, including: presenting Wheeler as a witness to authenticate corporate docu-

ments, which the court described as an attempt to create a fraud on the court; making frivolous objections based upon an alleged attorney-client privilege to prevent the truth from emerging about Wheeler's lack of qualifications to testify; concealing from the court his personal interest in the litigation as the proposed Movement speaker in Forsyth County; and asking an adverse witness whether he was a veteran, in an effort to embarrass and disparage him.[13] The judge

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court later construed most, if not all, of these documents, as part of the record after counsel for the defendants stipulated to their authenticity. See Rec. III, pp. 98-102.

[13] On the issue of Barrett's interest in the litigation, the Movement contends that the district judge violated Fed.R.Evid. 201 by taking judicial notice of Barrett's activity in the prior demonstrations in Cumming. During the TRO hearing, the judge stated, "It is clear to the court at this time ... that you're more than an attorney in this case; you

made clear that these matters raised serious issues about Barrett's compliance with professional ethical standards and stated that he was considering the possibility of sanctions under Fed.R.Civ.R. 11. He announced from the bench:

> I'm going to permit you to conclude this case. You've started it; I'm going to permit you to conclude it. I may or may not ultimately rule upon it based upon the issue that has been raised, but we're in the middle of it. I'm going to have it concluded. The matter's not over. So, if you're got any other evidence to present, present it. Let's get on with it.

Rec. III, p. 94.

In its written order of January 23 denying a TRO the court addressed at length Barrett's conduct and concluded that Barrett "is hereby on notice that the

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are an active participant and party. I became convinced of that when I saw the news broadcast and saw you standing on the back of a pickup truck with a bullhorn whipping up the crowds in Forsyth County, in the parade ..." Rec. III, p. 93. We need not determine whether this observa-

court will not grant any future applications to appear pro hac vice due to the misconduct which occurred during the hearing in this action." The Movement filed a motion to reconsider this ruling, in which Barrett requested a hearing and opportunity to respond. On April 25 the court denied this request for a hearing on the grounds that it had informed Barrett of its concerns at the January 19 hearing, and that Barrett had an opportunity to respond to them then. Its order said:

> During the hearing, the court warned counsel that it considered counsel's actions to be improper and that the court would consider Rule 11 sanctions and would probably not allow counsel to appear pro hac vice again. 82-84, 94. However, for expediency, counsel was allowed to complete the hearing....
>
> ... Nevertheless, the court will reconsider its ruling to the extent that the denial of pro hac vice applies prospectively. The court hereby amends its previous ruling as follows:
>
> Counsel for plaintiff's authority to

> appear pro hac vice is hereby revoked for purposes of this case only. In future cases before this court, counsel may apply for leave to appear pro hac vice and the court will consider such applications on a case by case basis.
>
> Accordingly, the motion for reconsideration is granted to the extent that the court has modified its order as set forth immediately above. The motion is denied in all other respects.

Rec. II, Document 20 pp. 8-9 (footnote omitted).

We are unsure what the court intended by these rulings on Barrett's pro hac vice status. We believe the matter can best be laid to rest on remand by the district court's clarifying its intentions and by our stating at this time the governable principles that then would be applicable.[14] If the court intended that

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tion falls within the category of facts of which a court may take judicial notice under Rule 201(b)(2), since the Movement did not move for a hearing on it under Rule 201(e). See Norman, 836 F.2d at 1304.

Barrett would be permitted to "conclude this case," then Barrett suffered no deprivation. He can finish the present case but, as set out in the April 25 order quoted above, in any future case he must apply for pro hac vice status. This is what he would be required to do anyhow. Pro hac vice status is for a case, or for a described matter within a case, and is not a continuing authorization.

On the other hand, if on remand the district court clarifies its orders by stating that it intended to revoke, and has revoked, Barrett's authority to appear in this case beyond the TRO hearing, we hold that Barrett's objections to revocation by the district court are not well taken. The preliminary legal issue presented is whether the district court satisfied procedural constraints on its authority to revoke pro hac vice status.

In Kirkland v. National Mortgage Network, Inc., 884 F.2d 1367 (11th Cir.1989), the Eleventh Circuit declared that when a court admits an attorney pro hac vice, it may not later revoke this status without notice of charges against him and an opportunity to explain. Id. at 1371-72 (citing Kleiner v. First National Bank of Atlanta, 751 F.2d 1193, 1211 (11th Cir.1985)). Barrett contends that the district court did not provide him these notice and hearing rights. We disagree. A separate hearing on this issue is not necessary in every case. Johnson v. Trueblood, 629 F.2d 302, 304 (3d Cir.1980), cited in Kirkland, 884 F.2d at 1372 n. 12. In this case the district court put Barrett on clear notice of its concerns during the course of the January 19 hearing and allowed him an opportunity

to explain his actions there.[15] Moreover, since the conduct forming the factual basis of the court's ruling occurred in court before the district judge, a separate hearing was not necessary for fact-finding purposes.

The district judge's findings of fact on the revocation issue are reviewed on a clearly erroneous standard. Norton v. Tallahassee Memorial Hospital, 700 F.2d 617, 619 (11th Cir.1983). We give great regard to the district court's findings supporting its decision in this case, including those bearing on Barrett's motivations and state of mind, since those findings are based on the judge's "obser-

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[14] We address these issues in the interest of efficiency and expedition. We do not, by addressing them, imply or even hint at what the district court's position should be on remand.

[15] These facts distinguish this case from the situations in Kleiner and Kirkland, where the disqualified attorneys

vation of witnesses, [and] his superior opportunity to get 'the feel of the case.'" Id. quoting Noonan v. Cunard Steamship Co., 375 F.2d 69, 71 (2d Cir.1967) (Friendly, J.)). In particular, the evidence fully supports the finding that Barrett's examination of witness Wheeler as an "acting secretary" of the Movement was an effort to commit a fraud on the court. Even the cold record demonstrates that Barrett attempted to establish a false appearance of Wheeler's competency to testify and to sponsor documents by giving him a manufactured title, when in reality Wheeler bore neither knowledge of nor responsibility over the subject matter. As this pretense unraveled under cross-examination, Barrett attempted to prevent discovery of the ruse through meritless objections, and later through leading questions on redirect

examination.

Finally, we identify the appropriate standard by which to review a conclusion by the district court that revocation is warranted. "Cases applying the standards of the Code of Professional Responsibility to questions of attorney disqualification warrant full appellate review to ensure that there is consistency of treatment." Norton, 700 F.2d at 620. Similarly, where disqualification raises other substantial concerns such as a criminal defendant's rights under the Sixth Amendment, the district court's decision is subject to careful examination by the appellate court. Id. On the other hand, this case presents unique facts involving the integrity of the court system and respect for its participants within a courtroom proceeding. Under these circumstances, the district court must be accorded some

discretion in monitoring its own processes. Id. at 619-20; United States v. Dinitz, 538 F.2d 1214, 1219 (5th Cir.1976) (en banc), cert. denied, 429 U.S. 1104, 97 S.Ct. 1133, 51 L.Ed.2d 556 (1977). With these principles in mind, we believe that if the district court ruled that Barrett's conduct at the January 19 hearing justified revocation of his pro hac vice status, this ruling fell within the ambit of its appropriate discretion.

VI. Attorney Fees

The trial court granted the motions of the Board of Education and the City for attorney fees under 42 U.S.C. §1988, and awarded $4,700 to the City and $1,840 to the Board, on the ground that the suit was frivolous, unreasonable and without foundation. See, e.g., O'Neal v. DeKalb County, 850 F.2d 653, 658 (11th Cir.1988). The conclusions that we have reached on

the merits of the appeal require that the award of attorney fees in favor of the City be reversed. Although we have affirmed the district court on the merits with respect to the Board of Education, the factual and legal issues relating to the Movement's alternative request to use the school parking lot as the site for its rally and speeches, the Board's prior commitment to use of school premises for a basketball tournament, and the conflict between these events, were not frivolous matters for decision. Thus the award of attorney fees to the Board of Education must also be reversed. Accord Acorn v. City of Phoenix, 798 F.2d 1260, 1273 n. 15 (9th Cir.1986).

VII. Summary

Summarizing, the judgment dismissing the claims against the City is VACATED and these claims are REMANDED for further pro-

ceedings in which the City is entitled, if it wishes, to an opportunity to justify the challenged provisions of its ordinance. The judgment dismissing the claims against Forsyth County is REVERSED and judgment shall be entered holding unconstitutional the provision of the County's ordinance providing for a fee of up to $1,000 per day. The judgment dismissing the claims against the Board of Education is AFFIRMED. The rulings of the district court with respect to Barrett's pro hac vice status are REMANDED for further proceedings as described in this opinion. The judgment awarding attorney fees to the City and to the Board of Education is REVERSED.

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were given no notice of the factual concerns of the court before disqualification. See Kirkland, 884 F.2d at 1369, 1372 n. 13; Kleiner, 751 F.2d at 1199, 1210-11.